IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.375 OF 2005

M/s Arora Associates ... Petitioners

v/s

Union of India ... Respondents

Mr S.C. Gupte i/b Mr V.L. Panjuani for Petitioners.

Mr T.J. Pandian for Respondents.

CORAM : D.K. DESHMUKH J.

DATE : 19TH DECEMBER 2005.

P.C. :-

1. By consent of parties, the petition is disposed off at admission stage.

2. By this petition, the petitioners challenge the award made by the Arbitral Tribunal dated 9th June 2005. The only challenge argued before me was that the award has been made by the Arbitral Tribunal in breach of the mandatory provisions of sections 12 and 14 of the Arbitration and Conciliation Act 1996. It is submitted that the Arbitral Tribunal held hearing on 13th June 2003 when the respondents were directed to furnish certain additional documents. The Arbitral Tribunal also permitted the petitioners to examine the levels 1 and 2 relating to kms. 174 to 186 available with the respondents prior to submission of certificate of satisfactory hearing. The respondents were directed to permit the petitioners to inspect the level books. It appears that thereafter there was controversy between the parties whether the inspection of level books as directed by the Arbitral Tribunal was permitted by the respondents or not. The hearing of the matter was closed by the Arbitral Tribunal in June 2003 and the Arbitral Tribunal did not make any award. It appears that the petitioners addressed a letter to the Arbitral

Tribunal making grievance about the respondents not permitting inspection of the level books as directed by the Arbitral Tribunal. Ultimately, while the proceedings were pending before the Arbitral Tribunal, the petitioners addressed a letter dated 23rd February 2004 to the Arbitral Tribunal pointing out that one of the members of the Arbitral Tribunal - Mr S.N. Agarwal is presently working as immediate superior Office of the respondents. The petitioners also made a grievance that Mr Agarwal was conducting arbitral proceedings as member of the Arbitral Tribunal, their apprehension was that he has bias against them. By that letter, the petitioners requested the Arbitral Tribunal to hear them on this matter and decide the challenge. The Arbitral Tribunal did not address any communication in this regard to the petitioners and ultimately made the award. In the award, there is no reference made to the challenge raised to the continuance of one of the members of the Arbitral Tribunal. It is the submission of the learned counsel appearing for petitioners that when the challenge to the member of the Arbitral Tribunal was made, the arbitral proceedings were pending. In terms of provisions of section 13 of the said Act, challenge to the continuation of member of the Arbitral Tribunal can be raised at any time during the pendency of the Arbitral Tribunal and once that challenge is raised, unless by agreement of parties, the appointment of

Arbitrator is withdrawn or he withdraws on his own, there is statutory duty cast on the Arbitrator to go ahead with the arbitration proceedings only after deciding the challenge. Without deciding the challenge, the Arbitral Tribunal does not get jurisdiction to make the award and to proceed further in the arbitration proceedings and make the award. The learned counsel appearing for respondents is not in a position to point out that the challenge raised by the petitioners for continuance of one of the members of Arbitral Tribunal had been decided by the Arbitral Tribunal either in the award or by separate order. He submits that the challenge to the continuance of one of the members of Arbitral Tribunal has to be raised while the arbitration proceedings were pending. As, admittedly by the date the objection was raised the award was not made, the arbitral proceedings were pending.

3. Perusal of sub-section (2) of section 3 of the said Act provides that unless there is a different procedure agreed upon between the parties, a party can challenge continuance of member of Arbitral Tribunal as member of such Tribunal immediately after becoming aware of the circumstances giving rise to the apprehension of bias. It is further clear that such a challenge can be raised at any time while arbitration proceedings are pending. Perusal of sub-section (3) of section shows

that once challenge is raised during the pendency of the arbitration proceedings, three things can happen - (1) the Arbitrator ceases to continue as part of Arbitral Tribunal as he himself withdraw from the Arbitral Tribunal; (2) the parties by consent agree to exclude the concerned Arbitrator from the Arbitral Tribunal; (3) the Arbitral Tribunal decides on the challenge raised. Perusal of sub-section (4) of section 13 shows that in case the Arbitrator voluntarily withdraws as the Arbitral Tribunal is requested to be reconstituted, there is no question of the Arbitral Tribunal continuing further. But, if none of these things happen, the Arbitral Tribunal gets jurisdiction to proceed further in the matter only after deciding the challenge and only in case the Arbitral Tribunal finds that the challenge is not successful. Thus, for the same Arbitral Tribunal to continue with the proceedings in relation to which an objection is raised, it is a condition precedent hat the Arbitral Tribunal decides that challenge and negatives the challenge. In other words, unless the Arbitral Tribunal makes an order rejecting the challenge, it does not get the jurisdiction to continue with the arbitral proceedings further. In the present case, the challenge has not been decided upon and obviously therefore, the challenge has not been rejected. It is clear from the provisions of sub-section (4) of section 13 that without rejecting the challenge raised, the same Arbitral

Tribunal does not get jurisdiction to proceed with the matte and therefore, the award made by the Arbitral Tribunal keeping the challenge pending is an award made by the Arbitral Tribunal which did not have the jurisdiction to make the award. In the result therefore, petition succeeds and is allowed. Rule is made absolute in terms of prayer clause (a). The respondents are directed to pay costs of this petition to the petitioners as incurred by the petitioners.

. Parties to act on copy of this order duly authenticated by the Associate / Private Secretary as true copy.

. Certified copy expedited.